TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 395

WILLIAM D. GORDON, SECRETARY OF BANKING OF PENNSYLVANIA, ETC., PETITIONER,

vs.

JOSEPH OMINSKY AND ROBERT B. ELY, 3RD, FEDERAL RECEIVERS OF CHRISTIAN A. FISHER BUILDING AND LOAN ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 21, 1934.

CERTIORARI GRANTED NOVEMBER 5, 1934.

SUPREME COURT OF THE UNITED STATES

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[fols. a & 1]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

March Term, 1933

In Equity

No. 7619

HARVEY STEIGNER and IDA V. STEIGNER, His Wife; EDITH B. GOODE, JULES SKLAR, PHILIP ZINMAN,

v.

CHRISTIAN A. FISHER BUILDING AND LOAN ASSOCIATION

Attorneys:

Charles Polis, Esq., for plaintiff.
C. J. Buckman, Esq., for Secretary of Banking.
Oscar Brown, Esq., for receivers.

DOCKET ENTRIES

Mar. 31, 1933. Bill of Complaint, filed.
Mar. 31, 1933. Subpœna exit, returnable 4/20/33.
Mar. 31. 1933. Motion for appointment of receivers filed.
Mar. 31, 1933. Decree fixing time for hearing motion for appointment of receiver, filed.
Apr. 1, 1933. Subpœna returned—service accepted—with instructions to enter appearance of C. J. Buckman, Esq., for defendant, endorsed thereon and filed.

[fol. 2]

Apr. 18, 1933. Appearance of C. J. Buckman, Esq., for Wm. D. Gordon, Sec'y of Banking of the Commonwealth of Penna. in possession of business, etc., of defendant, filed.
Apr. 18, 1933. Answer filed.
Apr. 18, 1933. Suggestion of taking possession of business, etc., of defendant by Sec'y of Banking of Commonwealth of Penna. filed.
June 2, 1933. Præcipe to place case on argument list, filed.
July 12, 1933. Argued sur motion for appointment of receiver.

July 18, 1933. Opinion, Dickinson, J., denying motion for appointment of receiver, filed.

July 24, 1933. Opinion, Dickinson, J., granting leave to enter decree appointing receivers, filed.

Aug. 2, 1933. Decree appointing Joseph Ominsky and Robert B Ely, 3rd, receivers, filed.

Aug. 18, 1933. Bond of Receivers with New Amsterdam Casualty Co., surety, in $25,000 and decree approving same, filed.

Aug. 22, 1933. Appearance of Wm. A. Schnader, Esq., for Wm. D. Gordon, Sec'y of Banking in possession of business, etc., of Christian A. Fisher Bldg. & Loan Ass'n, filed.

Aug. 22, 1933. Suggestion that designation of defendant be amended, filed.

[fol. 3]

Aug. 23, 1933. Appearance of Oscar Brown, Esq., for receivers, filed.

Aug. 23, 1933. Assignments of Error, filed.

Aug. 25, 1933. Petition for and Order of Court granting appeal, filed.

Sept. 14, 1933. Bond sur Appeal in $250 with Fidelity & Casualty Co., N. Y., and Decree approving bond, filed.

Sept. 14, 1933. Citation allowed and issued.

Sept. 14, 1933. Copy of Notice of Appeal filed.

Sept. 14, 1933. Præcipe for transcript of record sur appeal, filed.

Sept. 18, 1933. Citation returned "Service accepted" and filed.

Sept. 18, 1933. Petition by Anton Namialo for leave to foreclose mortgage and decree granting petition, filed.

[fol. 4] IN UNITED STATES DISTRICT COURT

[Title omitted]

BILL OF COMPLAINT—Filed March 31, 1933

To the Honorable the Judges of the said Court:

Harvey Steigner and Ida V. Steigner, his wife, Edith B. Goode, Jules Sklar and Philip Zinman file this bill on

behalf of themselves and all other creditors or stockholders or claimants against defendant who shall join as parties plaintiff herein, and complaining say that:

1. That plaintiffs are citizens of the State of New Jersey, residing as follows:

Harvey Steigner and Ida V. Steigner—Bettlewood, Haddon Township;
Edith B. Goode—Atlantic City;
Jules Sklar—Camden;
Philip Zinman—Camden.

[fol. 5] 2. Christian A. Fisher Building and Loan Association, hereinafter referred to as defendant, is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, and engaged in the city and county of Philadelphia, in the conduct of the business of a building and loan association, having been incorporated for that purpose June 18, 1919.

3. The amount in controversy in this matter exceeds the sum of $3000, exclusive of interest and costs.

4. The plaintiffs are members of the defendant association by virtue of their ownership of shares of stock therein on which there has been paid a total sum of $8145, as follows:

(a) Harvey Steigner and Ida V. Steigner, his wife, own

(1) Book No. 1741 for five double shares in the Twelfth Series, on which there has been paid in the sum of $822.50;

(2) Book No. 2464D for five shares in the Eighteenth Series on which there was paid in the sum of $412.50;

(b) Edith B. Goode is the owner of Book No. 1880D for five double shares in the Thirteenth Series, on which there has been paid in the sum of $730;

(c) Jules Sklar is the owner of

(1) Book No. 868 for five shares in the Fifth Series, on which there has been paid in the sum of $600;

(2) Book No. 1124 for five shares in the Eighth Series, on which there has been paid in the sum of $510;

[fol. 6] (3) Book No. 1881 for ten double shares in the Thirteenth Series, on which there has been paid in the sum of $1440;

(4) Book No. 2366 for five double shares in the Seventeenth Series, on which there has been paid in the sum of $480;

(5) Book No. 1740 for ten double shares in the Twelfth Series, on which there has been paid in the sum of $1640;

(6) Book No. 256 for five shares in the Second Series, on which there has been paid in the sum of $720;

(d) Philip Zinman is the owner of Book No. 1742 for five double shares in the Twelfth Series, on which there has been paid in the sum of $790.

5. The aforesaid shares of stock were either declared matured by the defendant or else noted as withdrawn as follows:

(a) On the shares owned by Harvey Steigner and Ida V. Steigner, his wife

(1) Book No. 1741 was declared matured September 17, 1931;

(2) Notice of withdrawal on Book No. 2464D was filed the third Thursday of July, 1931.

(b) On the shares owned by Edith B. Goode, notice of withdrawal was filed the third Thursday of August, 1931.

(c) On the shares owned by Jules Sklar

(1) On Books Nos. 868, 1124, 1881 and 2366, notice of withdrawal was filed June 18, 1931;

[fol. 7] (2) Book No. 1740 was declared matured by the defendant on September 17, 1931;

(3) Book No. 256 was declared matured November 19, 1931.

(d) The shares owned by Philip Zinman were declared matured by defendant on September 17, 1931.

6. The defendant has not paid anything on account of the withdrawals aforesaid.

7. The defendant has paid on account of the maturities aforesaid the following sums:

(a) On the shares owned by Harry Steigner and Ida V. Steigner (Book No. 1741), $400, leaving a balance of $600.

(b) On the shares owned by Jules Sklar (Book No. 1740), $800, leaving a balance of $1200.

(c) On the shares owned by Philip Zinman (Book No. 1742), $388, leaving a balance of $582.

8. By reason of the aforesaid, the defendant is indebted to the plaintiffs in the sum of $7554.50.

(a) Harvey Steigner and Ida V. Steigner, $1012.50.

(b) Edith B. Goode, $730.

(c) Jules Sklar, $5230.

(d) Philip Zinman, $582.

9. The defendant is indebted to its banks for borrowed money to the extent of approximately $150,000, and is indebted to other preferred creditors on claims arising other than from the ownership of stock in the amount of $50,000 [fol. 8] or a total of approximately $200,000.

10. Defendant association is now and has been for a long time insolvent and the real, actual and fair value of its assets is far less than its liability to stockholders, on dues paid in together with its general indebtedness, and at the present time its capital of approximately $1,000,000 is actually impaired to the extent of approximately 60 per cent., or approximately $600,000.

11. During the past year or more defendant has sustained losses of approximately $500,000 on its mortgage loans of approximately $1,293,250; during said time defendant has been operating and carrying the real estate which it was compelled to buy in on foreclosure of many of its mortgages at a great loss; and during said period defendant has abandoned a large amount and proportion of its assets.

13. By reason of its present insolvent condition, which has existed for the past year and more, defendant has abandoned entirely the active conduct of its business; for

more than two years has made no mortgage loans; has practically ceased making stock loans; for more than two years has made no payment of withdrawals, although it now has a withdrawal list in excess of $300,000, and the payment of dues, interest and premiums on its outstanding mortgage loans are considerably in arrears in an amount which cannot be estimated by the plaintiffs.

14. As a result of its existing insolvency, defendant has abandoned the collection of further dues on free shares and has refused to receive dues from free shareholders so that [fol. 9] its income consists exclusively of rents and payments received from borrowers on their loans.

15. By reason of the existence of approximately $300,000 in withdrawals still unpaid, of its large outstanding indebtedness for borrowed money and preferred claims of outstanding creditors in the amount of approximately $200,000, defendant has been and is subject to seizure of its assets by many of its creditors or stockholders, as a result of which the assets of defendant may be dissipated and its assets be subjected to forced sales and thereby destroyed as assets of defendant.

16. The following officers of the defendant association and who are still in control of the association's business, have been indicted for embezzlement and misapplication of building and loan funds in the Court of Quarter Sessions of Philadelphia County, as follows:

President—Christian A. Fisher, October Term, 1932, No. 1338-42, November Term, 1932, No. 1224-33, 51, 53, 58, 63.

Vice-President—Fred Shmidheiser, October Term, 1932, No. 1342, 47, November Term, 1932, No. 1234-49, 56, 57, 66-70.

Secretary—P. William Huster, October Term, 1932, No. 1340, 41, November Term, 1932, No. 1224-30.

Treasurer—Harry A. Rau, October Term, 1932, No. 1338-41, November Term, 1932, No. 1224-49.

Conveyancer—George A. Nahm, October Term, 1932, No. 1343-47, November Term, 1932, No. 1234-36, 50-55, 61-64, 69, 70.

[fol. 10] 17. Unless defendant's assets are conserved and its affairs managed and conducted free of preferences, plaintiffs and other claimants against the assets of defend-

ant, creditors as well as stockholders, will be without means of securing payment of their claims or of participating equally in the assets of defendant along with other claims or stockholders equal in class or priority.

18. By reason of the foregoing, in the interest of plaintiffs as well as of others having the same rights against defendant, and of all its members and creditors, and to prevent immediate and irreparable loss or damage, defendant's affairs should be liquidated and its assets distributed under the equitable and impartial supervision of a court of competent jurisdiction.

19. Wherefore plaintiffs, being in need of equitable relief and having no adequate remedy at law and having relief only in equity, file this bill of complaint on behalf of themselves and all parties in interest who may come in and contribute to the expense of this action, and plaintiffs pray your Honorable Court:

(a) That a receiver or receivers be appointed temporarily until hearing and finally thereafter to take charge of and manage the property and assets of Christian A. Fisher Building and Loan Association, a corporation, the defendant, of every nature and wheresoever the same may be situate in whosoever hands the same may be;

(b) That said receiver or receivers be authorized and empowered to demand, sue for, collect, receive and take into their possession all the goods, chattels, rights, credits, moneys, effects, lands, tenements, choses in action, books, [fol. 11] papers, and records and all other property, real and personal of whatsoever kind, character or description and wheresoever situate of Christian A. Fisher Building and Loan Association, the defendant, and to institute, prosecute, intervene, become party to, defend or compromise suits at law or in equity for the protection, recovery or maintenance of any of the property and assets, rights, damages or demands of or belonging to the defendant including also the power to continue in such pending suits or action; and including also the institution and prosecution of such ancillary proceedings, all as said receiver or receivers may deem necessary or proper, and to settle and compound or make allowance on any and all debts now due or owing to the defendant as said receiver or receivers may deem advisable or proper;

(c) That each and every the officers, directors, agents, employees, and servants of defendant and all other persons be required and commanded forthwith upon demand of said receiver or receivers to deliver up to him or them all and every part of the property and assets of defendant wheresoever situate including also all banks, records and documents of, concerning or in any way relating to the defendant or its business;

(d) That your Honorable Court marshal the assets of defendant and ascertain the respective liens and priorities existing against the property of defendant and the rights, liens and equities of its creditors, stockholders or other claimants;

(e) That the directors, officers and agents of defendant, its creditors, stockholders and claimants and all other per- [fol. 12] sons be enjoined and restrained from selling, transferring, assigning or disposing of or in any manner interfering with any of the property of defendant, or interfering with the said receiver or receivers in the performance of his or their duty, and that they or any of them deliver up, transfer, convey and assign to said receiver or receivers all or any of the property or property rights of defendant;

(f) That the directors, officers and agents of defendant, its creditors, stockholders and claimants and all other persons be enjoined and restrained from levying, executing upon, attaching, intermeddling with or taking possession of all or any of the property of defendant and from taking or attempting to take into their possession any of the property of defendant or in anywise interfering or intermeddling therewith;

(g) That said receiver or receivers proceed forthwith with the care and management of the property and assets of defendant and liquidate the business and property and assets of defendant in such manner as they may deem necessary or proper;

(h) That your Honorable Court grant such other and further relief and such other and further powers to said receiver or receivers as the exigencies of the case may require and as to your Honorable Court may seem proper.

And they will ever pray, etc.

Charles Polis, Attorney for Plaintiffs.

[fol. 13] *Duly sworn to by Harvey Steigner. Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

MOTION FOR APPOINTMENT OF RECEIVER—Filed March 31, 1933

And now, comes the plaintiff in the above-named case and moves the Court for the appointment of a receiver for the causes set forth in the bill of complaint filed therein.

Charles Polis, Attorney for Plaintiff.

[fol. 14] IN UNITED STATES DISTRICT COURT

ORDER FIXING TIME FOR HEARING ON MOTION FOR APPOINTMENT OF RECEIVER—Filed March 31, 1933

Before WALSH, J.

And now, March 31, A. D. 1933, upon the filing of the bill of complaint in the above-entitled case and upon consideration thereof, it is

Ordered that the hearing sur motion for the appointment of a receiver of the above-named defendant company be and the same is hereby fixed for Friday, April 21, 1931 at 10 o'clock A. M.

It is further ordered that copies of the bill of complaint, of the motion for receiver and of this order be served upon the defendant company on or before Wednesday, April 5, 1933.

It is further ordered that answering affidavits to the motion for the appointment of receiver be filed and served upon Charles Polis, Esq., attorney for the plaintiff, on or before Wednesday, April 19, 1933.

By the Court.

Attest:

Leo A. Lilly, Deputy Clerk.

[fol. 15] IN UNITED STATES DISTRICT COURT

SUGGESTION AS TO SUBSTITUTION—Filed April 18, 1933

And now, April 18, 1933, comes Clarence J. Buckman, Esq., whose appearance was entered for the defendant in the above-entitled case, and states that William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, on April 8, 1933, took possession of the business and property of the Christian A. Fisher Building and Loan Association, a corporation, in accordance with the provisions of the Banking Act of the Commonwealth of Pennsylvania of 1923 and its amendments and suggests that William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, be substituted as defendant in place and stead of Christian A. Fisher Building and Loan Association, a corporation.

(Sgd.) Clarence J. Buckman, Special Counsel for William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, in Possession of the Business and Property of the Christian A. Fisher Building and Loan Association, a Corporation.

[fol. 16] IN UNITED STATES DISTRICT COURT

ANSWER TO BILL OF COMPLAINT—Filed April 16, 1933

To the Honorable the Judges of the said Court:

The answer of William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, in possession of the business and property of the Christian A. Fisher Building and Loan Association, as stated by Robert B. Ely, 3rd, his Special Deputy as agent, respectfully represents:

1. In answer to paragraph No. 1 of the bill of complaint filed, respondent avers that the books and papers in his possession failed to disclose any stockholders or shareholders known as "Edith B. Goode, Jules Sklar, Philip Zinman"; that the books and records in the possession of respondent do not indicate the addresses of Harvey Steig-

ner and Ida V. Steigner, who are shareholders in the Christian A. Fisher Building and Loan Association. Respondent, therefore, requests that the place of residence of complainants be proved if deemed material.

2. Admitted that the facts set forth were true as of the date of the filing of the bill of complaint. Respondent avers, however, that the business and property of the Christian A. Fisher Building and Loan Association was taken possession of by William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, on April 8, 1933, by virtue of the provisions of the Banking Act of 1923 and its amendments and that he did appoint Robert B. Ely, 3rd, as Special Deputy as agent in charge thereof.

3. Admitted.

[fol. 17] 4. In answer to paragraph No. 4 of the bill of complaint filed respondent avers that:

(a) According to the books and records in his possession Harvey Steigner and Ida V. Steigner are the owners of Book No. 1741 on which there has been paid in a total of $420 and also Book No. 2464D on which there has been paid in the sum of $420.

(b) According to the books and records of the association Sarah E. Lewis is the owner of Book No 1880D on which there has been paid in a total of $690.

(c) According to the books and records of the association, which are in the possession of respondent, Jennie R. Lewis is the owner of the following books on which there has been paid in the amounts set forth below:

Book No. 868	$600
Book No. 1124	$510
Book No. 1881	$1440
Book No. 2366	$480
Book No. 1740	$840

and that William R. Lewis is the owner of Book No. 256 on which there has been paid in the sum of $720.

(d) According to the records and books of the Christian A. Fisher Building and Loan Association, in possession of respondent, Nathan Lewis is the owner of Book No. 1742 on which there has been paid in a total sum of $402.

Respondent, therefore, for the purpose of these proceedings denies that Edith B. Goode, Jules Sklar and Philip Zinman, or any of them, are stockholders or shareholders in the Christian A. Fisher Building and Loan Association and asks that this fact be proved if deemed material.

[fol. 18] 5. (a) In answer to the averment of paragraph No. 5 in the bill of complaint filed, respondent admits that the shares of stock owned by Harvey Steigner and Ida V. Steigner, his wife, represented by Book No. 1741 was declared matured on September 17, 1931. Respondent avers, however, that the maturity of said shares of stock was rescinded by vote of the board of directors on October 20, 1932. Respondent has been unable to locate any record of notice of withdrawal on Book No. 2464D.

(b) Respondent avers that Book No. 1880 according to the records in his possession is owned by Sarah E. Lewis. There is no record of any notice of intention to withdraw.

(c) Respondent denies that there is any stock in the association owned by Jules Sklar; and avers that the books represented as being owned by him in the bill of complaint filed are, according to the records of the association, which are in the possession of respondent, owned by Jennie R. Lewis and William R. Lewis. Respondent has no record of any notice of withdrawal with respect to any of these shares of stock; admits declaration of maturity of Book No. 1740 on September 17, 1931, and Book No. 256 on November 19, 1931, but avers that the declaration of maturity of these series was rescinded by the action of the board of directors at a meeting held on October 20, 1932.

(d) According to the records in possession of respondent, Philip Zinman is not a stockholder in the Christian A. Fisher Building and Loan Association, the stock alleged in the bill of complaint filed being owned by him is registered in the name of Nathan Lewis. This particular stock was declared matured on September 17, 1931, but the declara-[fol. 19] tion of maturity was rescinded at a subsequent meeting of the board of directors on October 20, 1932.

6. Admitted.

7. In reply to the averments in this paragraph respondent avers that the records in his possession do not disclose

any payments on account of maturities and further avers that the records in his possession show that the shares alleged to be owned by Jules Sklar and Philip Zinman do not stand in the names of these parties but as above set forth, which are recorded as being owned by Jennie R. Lewis, William R. Lewis and Nathan Lewis.

8. In answer to paragraph No. 8 of the bill of complaint filed, respondent denies that the Christian A. Fisher Building and Loan Association was indebted to the plaintiffs in the sum of $7,554.50 for the reason that according to the books and records in possession of respondent Edith B. Goode, Jules Sklar and Philip Zinman are not stockholders or shareholders in the Christian A. Fisher Building and Loan Association and that, therefore, the only indebtedness of the association to any of the complainants is to Harvey Steigner and Ida V. Steigner, which amounts according to the records of the association are $840 and not $1,012.50 as set forth in paragraph No. 8 of the bill of complaint filed.

9. Admitted.

10. In answer to paragraph No. 10 of the bill of complaint filed, respondent admits that the facts set forth therein are substantially correct but pending completion of an audit of the books of the association and an appraisement of all its assets is unable to quote accurate figures.

[fol. 20] 11. In answer to paragraph No. 11 of the bill of complaint filed, respondent admits that the facts therein set forth are substantially correct. However, pending the completion of the audit and appraisement of the assets is unable to give any accurate figures as to losses, etc.

13. In reply to paragraph No. 13, respondent admits that the association at the present time is insolvent in that it is unable to pay its stockholders in full but has no knowledge as to how long this condition existed prior to the date the Secretary of Banking took possession thereof on April 8, 1933. It is denied, however, that the association had abandoned entirely the active conduct of its business. On the contrary, it is averred that the association had functioned for some time prior to the date possession of the association was taken by respondent on a limited basis. That is to say, the officers were in active charge thereof

taking all steps necessary to protect the assets of the association; payments were received on account of the principal and interest but no contributions were received in the way of dues.

14. Admitted.

15. Respondent denies that the association or its assets are subject to seizure by any of its creditors or stockholders and further denies that any of the assets of the association may be dissipated or subjected to forced sales and thereby destroy its assets. On the contrary, respondent avers that the action of the Secretary of Banking in taking possession of this association on April 8, 1933, has fully protected the interest of all parties interested in this association either as stockholders or creditors; that the [fol. 21] assets are not now subject to seizure nor attachable by any creditor; that the same will be disposed of by the Secretary of Banking in such manner as to realize the most for distribution to the parties entitled.

16. Admitted with the exception that Christian A. Fisher, the president of the association, has been acquitted.

17. Denied. Respondent avers that the action of the Secretary of Banking in taking possession of the business and property of the association will result in an equal distribution to parties of the same class and the preservation of the assets of the association.

18. This is exactly what has been done by virtue of the Secretary of Banking taking possession of this association. A certificate of possession has been filed in the Court of Common Pleas No. 4 of Philadelphia County as of March Term, 1933, No. 4445, and the action of the Secretary of Banking in administering the affairs of this association are subject to the approval of the said Court.

19. In view of the fact that the Secretary of Banking has taken possession of the business and property of the association in accordance with the provisions of the Banking Act of 1923 and its amendments and will administer the affairs of the association as a receiver subject to the confirmation of the Court of Common Pleas of Philadelphia County where the certificate of possession is registered, which will result in the preservation of the assets of the association and proper distribution of funds realized from the

liquidation of the assets, it is respectfully submitted to your Honorable Court that the bill of complaint filed in this mat-
[fol. 22] ter be dismissed as there is now no need for the appointment of a receiver by your Honorable Court.

And he will ever pray.

William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, in possession of the business and property of the Christian A. Fisher Building and Loan Association, by (Sgd.) Robert B. Ely, 3rd, Special Deputy as Agent.

Duly sworn to by Robert B. Ely, 3rd. Jurat omitted in printing.

[fol. 23] IN UNITED STATES DISTRICT COURT

OPINION SUR MOTION FOR APPOINTMENT OF RECEIVERS—Filed July 18, 1933

DICKINSON, J.:

This motion confronts us with a situation, not a theory. The law is well settled. No Court without justification for its refusal to act, can deny to those lawfully invoking it the exercise of its jurisdiction. Resort to the remedy sought is a right of the litigants. Different Courts may however have the like jurisdiction. When its exercise includes the control of a rem one only can function. This is a law of physics. Human laws have their policies as well as their doctrines. The law may have conferred jurisdiction over the same subject matter upon two or more different tribunals. The doctrine of the law is that any one may function. When, however, the exercise of jurisdiction means control of a rem an unseemly conflict is unavoidable after one has possession in fact. If possession in fact has not been taken as unseemly a race results. In such a situation the law without abandoning its doctrine interposes a policy. The policy is to avoid a conflict. This is accomplished by the simple expedient of all Courts according the exercise of jurisdiction to the tribunal which was the first to act. This, although a rule of policy, is practically such a necessary rule that it has the force of law. The very admirable brief of counsel for the plaintiffs makes this clear. The experienced counsel for defendant does not controvert it. The tribunals

here are this Court and the Commissioner of Banking for Pennsylvania. Whatever the truth may be we cannot concede that we should refuse to exercise jurisdiction because [fol. 24] the Commissioner's Office is equipped to render better service than is this Court. This is a matter of opinion. If the plaintiffs are so persuaded they can withdraw their Bill. If it is the right of the plaintiffs to have this Court function we must do so. The merits of the Bill have however not as yet been determined. The motion before us does not in essentials differ from the ordinary motion for a preliminary injunction. If, for illustration, the Bill on final hearing should be dismissed, the appointment of Receivers now would be abortive. A defense to the Bill is at least suggested by the Answer. It may or may not be a defense. If the Bill is sustained on final hearing, all which may have been done by the Commissioner is worse than wasted effort. This leads to a suggestion. All seem to be agreed that the assets of the Association must be taken in charge for administration and distribution. How they can best be administered is a practical question. The desired result can be accomplished in any one of several ways. An opportunity for the parties to confer to perhaps reach an agreement, should be afforded. If they cannot agree, the complications of an abortive Receivership or an abortive administration by the Commissioner should, so far as possible, be avoided. This can be done by an immediate, or at least early, hearing and final decree. If the defendant is prepared to stand on the Answer as filed and the plaintiffs think it unsufficient, the cause can be set down for a hearing on Bill and Answer. Neither of these methods of final disposition of the case should take more time than the present motion will require.

To afford opportunity to try out this suggestion, the motion for the appointment of Receiver is for the present denied, with leave to the plaintiffs to renew it at any time.

[fol. 25] IN UNITED STATES DISTRICT COURT

OPINION SUR HEARING OF CAUSE SET DOWN FOR HEARING ON BILL AND ANSWER—Filed July 24, 1933

DICKINSON, J.:

This is a Receivership Bill. We heard it on a motion for the appointment of Receivers. We are asked now to

dispose of it on final decree, the plaintiffs asking this by setting down the cause for a hearing on Bill and Answer. This is the equivalent of a demurrer to the Answer and accepts all its averments as verities.

A few general propositions may be formulated. Some of them are re-statements.

1. This Bill belongs to the class, the prayer of which is that the Court take over the administration and liquidation of the assets of the defendant corporation to save them from waste and improper diversion. Such Bills are the practical equivalent of assignments for the benefit of creditors. Whatever might at one time have been said on the subject of the equitable jurisdiction invoked, the practice of filing such Bills has become too well established to be now questioned. It is not here questioned but an altogether different question has been raised.

2. The only defense we can extract from this Answer is that the prayer for the appointment of Receivers should be denied because the Commissioner of Banking has now taken over the affairs and assets of the defendant and that all which can be done by this Court can and will be better done by the Commissioner.

[fol. 26] 3. It must be kept in mind that there are two prayers in this Bill, as in all such Bills. One is for the appointment of Receivers on final decree after the merits of the Bill have been heard and determined. The other is for a preliminary appointment of Receivers to act pending such final hearing. Such an appointment is the equivalent of a motion for preliminary injunction and is an anticipation of a final decree sustaining the Bill, if finally sustained, or otherwise is a mere ad interim working arrangement.

4. The latter motion was heard but no Receivers were appointed for the obvious reason that there was no need of a caretaker pending final hearing as the Commissioner of Banking was, at the time of the hearing, so acting.

5. The situation thus created was objectionable in that, if the Bill was finally sustained, the intrusion of the Commissioner would be found to be unwarranted and he could not efficiently function under this uncertainty. Moreover all his work would be wasted.

6. There were only two ways to overcome this difficulty. One was by having the Bill pushed to an early final decree; the other was to have the cause set down for a hearing on Bill and Answer if the defendant was willing to rest its defense on that set up. The parties have chosen the latter method.

7. The cause thus resolves itself into the one question of whether this Court or the Commissioner of Banking for Pennsylvania shall exercise jurisdiction over the administration of the affairs and distribution of the assets of the defendant corporation.

8. Whenever a litigant has the right to invoke the judicial powers of a Court, the exercise of its power and jurisdic-
[fol. 27] tion cannot be refused. A Court is no more warranted in refusing to function when it has jurisdiction than it is in usurping powers which it does not possess.

9. When two tribunals possess coordinate jurisdiction over the same rem, the doctrine is well established that the exercise of jurisdiction must be left to that one which is the first to act. The choice is determined solely by the calendar. The fact, if it be one, that the tribunal to which the second appeal is made, is better equipped to deal with the subject matter and that its administration would be more efficient is, for obvious reasons, not controlling. The illuminating opinion accompanying the ruling of the Circuit Court of Appeals for the Third Circuit has placed this doctrine beyond the pale of discussion.

10. The Answer filed admits this Court to have first asserted jurisdiction. It must in consequence continue to act.

A decree in accordance with these conclusions and appointing Receivers, may be submitted.

[fol. 28] IN UNITED STATES DISTRICT COURT

DECREE APPOINTING PERMANENT RECEIVERS—Filed August 2, 1933

Before Dickinson, J.

And now, to wit, this second day of August, 1933, this cause having come on for hearing sur motion for the ap-

pointment of permanent receivers on bill and answer, it is hereby ordered, adjudged and decreed as follows:

1. That Joseph Ominsky and Robert B. Ely, 3d, be and they hereby are appointed permanent receivers of the above-named defendant, Christian A. Fisher Building and Loan Association and of all of its property and assets of every nature and wheresoever the same may be situate and in whosesoever hands the same may be, and to proceed forthwith with the care and management of the property and assets of defendant and to liquidate the business and property and assets of defendant in such manner as they may deem necessary or proper, and for so doing to employ such persons and make such payments and disbursements as may be needful and proper, and said permanent receivers may upon application to and authority from this Court borrow such sums of money as in their judgment may be needful in order to preserve and protect the aforesaid property and assets of defendant, and to keep the same in proper condition or repair.

2. That said permanent receivers be and they hereby are authorized and empowered to demand, sue for, collect, receive and take into their possession all the goods, chattels, rights, credits, moneys, effects, lands, tenements, choses in action, books, papers and records and all other property, [fol. 29] real and personal of whatsoever kind, character or description and wheresoever situate of Christian A. Fisher Building and Loan Association the defendant, and to institute, prosecute, intervene in, become party to, defend or compromise suits at law or in equity for the protection, recovery or maintenance of any of the property and assets, rights, damages or demands of or belonging to the defendant including also the power to continue in such pending suits or actions; and including*ing* also the institution and prosecution of such ancillary proceedings, all as said permanent receivers may deem necessary or proper, and to settle and compound or make allowance on any and all debts now due or owing to the defendant as said permanent receivers may deem advisable or proper.

3. The defendant, Christian A. Fisher Building and Loan Association, its officers, directors, agents, employees and servants and all other persons be and the same are hereby required and commanded forthwith upon demand

of said permanent receivers to deliver up to them all and every part of the property and assets of defendant wheresoever situate including also its books, records and documents of, concerning or in any way relating to the defendant or its business;

4. That defendant, Christian A. Fisher Building and Loan Association, its officers, directors, agents, its creditors, stockholders and claimants and all other persons be and they hereby are enjoined and restrained from selling, transferring, assigning or disposing of or in any manner interfering with any of the property of defendant or interfering with the said permanent receivers in the performance of their duty and all or any of such persons are hereby ordered and required to deliver up, transfer, convey and assign to said permanent receivers all or any of the property or property rights of defendant.

[fol. 30] 5. That defendant, Christian A. Fisher Building and Loan Association, its directors, officers and agents, its creditors, stockholders and claimants and all other persons be and they hereby are enjoined and restrained from commencing, prosecuting or continuing to prosecute any action at law or in equity or otherwise against defendant or against said permanent receivers, or foreclosing upon, selling or in any wise disposing of any property of defendant or on which defendant holds any lien or encumbrance, without leave of this Court or the approval of said permanent receivers first had and obtained and said persons be and they are hereby enjoined and restrained from levying, executing upon, attaching, intermeddling with or taking possession of all or any of the property of defendant and from taking or attempting to take into their possession any of the property of defendant or in any wise interfering or intermeddling therewith.

6. Security to be entered by said receivers in the amount of $25,000. Receivers to report preliminarily within thirty days.

7. It is further ordered, adjudged and decreed that any moneys coming into the hands of the said permanent receivers shall be deposited in a designated depository approved by this Court, and that he advise the clerk of this court in writing of the name of the depository and of the date of the opening of the account therein.

8. Leave is given to any party in interest to move to modify or vacate the order of appointment of said receivers.

By the Court.

Attest: Leo A. Lilly, Deputy Clerk.

[fol. 31] In United States District Court

Suggestion as to Amendment of Title—Filed August 22, 1933

And now, this twenty-third day of August, 1933, comes William A. Schnader, Attorney General of the Commonwealth of Pennsylvania, whose appearance has been entered for the defendant in the above-entitled case, and states:

Whereas at the time William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, took possession of the business and property of the Christian A. Fisher Building and Loan Association, a corporation, in accordance with the provisions of the Banking Act of the Commonwealth of Pennsylvania of 1923, and its amendments, the said Banking Act provided that the said Secretary of Banking as being, "In possession of the business and property of the Blank Association."

And whereas since the time of the said taking of possession there has been passed the Banking Act of 1933, Act No. 111 of the year 1933, under the terms of which (Section 601) it is provided that the official title of the Secretary of Banking, when thus in possession of the business and property of a given institution, shall be receiver of such institution.

And now, therefore, it is suggested that the designation of the above-named defendant be amended to read, "William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, Receiver of the Christian A. Fisher Building and Loan Association."

Wm. A. Schnader, Attorney General of the Commonwealth of Pennsylvania, by (Sgd.) Clarence J. Buckman, Attorney for Defendant.

[fol. 32] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed August 25, 1933

William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, receiver of the Christian A. Fisher Building & Loan Association, considering himself aggrieved by the decree of this Court entered on the second day of August, 1933, wherein and whereby the petition of the above-named plaintiffs praying for the appointment of permanent receivers was granted in that one Joseph Ominsky and one Robert B. Ely, 3d, were appointed permanent receivers of the above-named Christian A. Fisher Building & Loan Association with the usual powers, does hereby appeal from the said decree to the United States Circuit Court of Appeals for the Third Circuit for the reasons specified in the assignment of error filed and prays that this appeal may be allowed and that a transcript of [fol. 33] the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Third Circuit.

Petitioner further prays that all proceedings be stayed until this appeal be finally adjudicated by the said Circuit Court of Appeals said appeal being in all respects made to operate as a supersedeas.

Wm. A. Schnader, Attorney General of the Commonwealth of Pennsylvania, by (Sgd.) Clarence J. Buckman, Attorney for Defendant.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed August 25, 1933

And now, to wit, this twenty-third day of August, 1933, the appeal of William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, receiver of the Christian A. Fisher Building & Loan Association, the defendant in the above-entitled case, to the United States Circuit Court of Appeals for the Third Circuit is hereby allowed.

Security to be first entered in the sum of $250.

By the Court.

Dickinson, J., Attest: Theodore L. Cobaugh, Deputy Clerk.

[fol. 34] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed August 23, 1933

And now, this twenty-third day of August, 1933, comes the petitioner, the above-named defendant, William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, receiver of the Christian A. Fisher Building & Loan Association, by W. A. Schnader, Attorney General of the Commonwealth of Pennsylvania, having prayed for an appeal to the United States Circuit Court of Appeals for the Third Circuit from the final decree of the United States District Court for the Eastern District of Pennsylvania entered on or about the second day of August, 1933, granting the above-named plaintiff's petition for the appointment of permanent receivers of the said Christian A. Fisher Building and Loan Association naming Joseph Ominsky and Robert B. Ely, 3d, as such receivers, and assigns as error that the District Court erred as follows:

First. In ordering and decreeing that the above-named plaintiffs' prayer for the appointment of receivers be granted and that the said Joseph Ominsky and Robert B. Ely, 3d, be named as such receivers the said decree being as follows:

"And now, to wit, this 2d day of August, 1933, this cause having come on for hearing sur motion for the appointment of permanent receivers on Bill and Answer, it is hereby ordered, adjudged and decreed as follows:

1. That Joseph Ominsky and Robert B. Ely, 3d, be and they hereby are appointed permanent receivers of the above-named defendant, Christian A. Fisher Building and Loan Association and of all of its property and assets of [fol. 35] every nature and wheresoever the same may be situate and in whosesoever hands the same may be, and to proceed forthwith with the care and management of the property and assets of defendant in such manner as they may deem necessary and proper, and for so doing to em-

ploy such persons and make such payments and disbursements as may be needful and proper, and said permanent receivers may upon application to and authority from this Court borrow such sums of money as in their judgment may be needful in order to preserve and protect the aforesaid property and assets of defendant, and to keep the same in proper condition or repair.

2. That said permanent receivers be and they hereby are authorized and empowered to demand, sue for, collect, receive and take into their possession all the goods, chattels, rights, credits, moneys, effects, lands, tenements, choses in action, books, papers and records and all other property, real and personal of whatsoever kind, character or description and wheresoever situate of Christian A. Fisher Building and Loan Association the defendant, and to institute, prosecute, intervene in, become party to, defend or compromise suits at law or in equity for the protection, recovery or maintenance of any of the property and assets, rights, damages or demands of or belonging to the defendant including also the power to continue in such pending suits or actions; and including also the institution and prosecution of such ancillary proceedings, all as said permanent receivers may deem necessary or proper, and to settle and compound or make allowance on any and all debts now due or owing to the defendant as said permanent receivers may deem advisable or proper;

3. The defendant, Christian A. Fisher Building and Loan Association, its officers, directors, agents, employees and servants and all other persons be and the same are hereby required and commanded forthwith upon demand of said [fol. 36] permanent receivers to deliver up to them all and every part of the property and assets of defendant wheresoever situate including also its books, records and documents of, concerning or in any way relating to the defendant or its business;

4. That defendant, Christian A. Fisher Building & Loan Association, its directors, officers and agents, its creditors, stockholders and Claimants and all other persons be and they hereby are enjoined ,and restrained from selling transferring, assigning or disposing of or in any manner interfering with any of the property of defendant or interfering with the said permanent receivers in the perform-

ance of their duty and all or any of such persons are hereby ordered and required to deliver up, transfer, convey and assign to said permanent receivers all or any of the property or property rights of defendant,

5. That defendant, Christian A. Fisher Building and Loan Association, its directors, officers and agents, its creditors, stockholders and claimants and all other persons be and they hereby are enjoined and restrained from commencing, prosecuting or continuing to prosecute any action at law or in equity or otherwise against defendant or against said permanent receivers, or foreclosing upon, selling or in any wise disposing of any property of defendant or on which defendant holds any lien or encumbrance, without leave of this Court or the approval of said permanent receivers first had and obtained; and said persons be and they are hereby enjoined and restrained from levying, executing upon, attaching, intermeddling with or taking possession of all or any of the property of defendant and from taking or attempting to take into their possession any of the property of defendant or in anywise interfering or intermeddling therewith.

6. Security to be entered by said receivers in the amount of $25,000.00. Receivers to report preliminarily within thirty days.

[fol. 37] 7. It is further ordered, adjudged and decreed that any monies coming into the hands of the said permanent receivers shall be deposited in a designated depository approved by this Court, and that he advise the Clerk of this Court in writing of the name of the depository and of the date of the opening of the account therein.

8. Leave is given to any party in interest to move to modify or vacate the order of appointment of said receivers.

By the Court.

Dickinson, J."

Second. In not ordering and decreeing that the above-named plaintiffs' petition for the appointment of permanent receivers of the Christian A. Fisher Building & Loan Association be dismissed as prayed for in the answer duly filed by petitioner herein.

Wherefore your petitioner prays that the said order and decree of the said District Court be reversed and that an

order be entered by it dismissing the above-mentioned plaintiffs' bill for the appointment of permanent receivers as heretofore prayed in the answer filed by the within petitioner.

Wm. A. Schnader, Attorney General of the Commonwealth of Pennsylvania, by (Sgd.) Clarence J. Buckman, Attorney for Defendant.

[fol. 38] IN UNITED STATES DISTRICT COURT

PRÆCIPE RE TRANSCRIPT ON APPEAL—Filed September 14, 1933

To the Clerk of the said Court:

Kindly include in the transcript of record on appeal in the above case the following papers:

1. The docket entries.
2. Bill of complaint.
3. Motion for appontment of receivers.
4. Decree fixing time for hearing motion for appointment of receivers.
5. Suggestion of taking possession of business, etc., of defendant by Secretary of Banking of the Commonwealth of Pennsylvania.
6. Answer of defendant.
7. Opinion, Dickinson, J., denying motion for appointment of receivers.
8. Opinion, Dickinson, J., granting leave for entering decree appointing receivers.
9. Decree appointing Joseph Ominsky and Robert B. Ely, 3d, receivers.
10. Suggestion that designation of defendant be amended.
11. Petition for and order of Court granting appeal.

[fol. 39] 12. Assignments of error.

13. Præcipe of transcript.
14. Clerk's certificate. And no others.

William A. Schnader, Attorney General of the Commonwealth of Pennsylvania, by Clarence J. Buckman, Attorney for Defendant.

[fol. 40] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 41] In United States Circuit Court of Appeals for the Third Circuit, October Term, 1933

No. 5267

William D. Gordon, Secretary of Banking of Pennsylvania, Statutory Receiver of Christian A. Fisher Building Loan Association, Appellant,

v.

Joseph Ominsky et al., Federal Receivers of Christian A. Fisher Building and Loan Association et al., Appellees

Minute Entry of Argument and Submission

And afterwards, to wit, the thirteenth day of October, 1933, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable J. Warren Davis and Honorable J. Whitaker Thompson, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the twenty-fifth day of July, 1934, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 42] In United States Circuit Court of Appeals for the Third Circuit, October Term, 1933

No. 5267

William D. Gordon, Secretary of Banking of Pennsylvania, Statutory Receiver of Christian A. Fisher Building Loan Association, Intervening Appellant,

v.

Joseph Ominsky and Robert B. Ely, 3rd, Federal Receivers of Christian A. Fisher Building and Loan Association et al., Appellees

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

Opinion—Filed July 25, 1934

Before Buffington, Davis, and Thompson, Circuit Judges

Davis, Circuit Judge:

The facts in this case are substantially like those in the case of the Commonwealth of Pennsylvania v. John G. Wil-

liams, et al., — Fed. (2d) —, in which an opinion has just been filed. The same issues are involved in this case as were in that. Consequently on the authority of that case, the decree of the District Court is affirmed.

A true Copy. Teste:
—— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 43] In United States Circuit Court of Appeals for the Third Circuit, October Term, 1933

No. 5267

William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, Statutory Receiver of Christian A. Fisher Building & Loan Association, Appellant,

v.

Joseph Ominsky et al., Federal Receivers of Christian A. Fisher Building and Loan Association, et al., Appellees

Order Affirming Decree—Filed July 25, 1934

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of August 2, 1933, of the said District Court in this cause be, and the same is hereby affirmed, with costs.

Philadelphia, July 25, 1934.

J. Warren Davis, Circuit Judge.

[File endorsement omitted.]

[fol. 44] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 45] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 5, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted, and the case is assigned for argument immediately following No. 394.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 39,023. U. S. Circuit Court of Appeals, Third Circuit. Term No. 395. William D. Gordon, Secretary of Banking of Pennsylvania, etc., petitioner, vs. Joseph Ominsky and Robert B. Ely, 3rd, Federal Receivers of Christian A. Fisher Building and Loan Association, et al. Petition for a writ of certiorari and exhibit thereto. Filed September 21, 1934. File No. 395, O. T., 1934.